

## **FBI Laboratory Practices for Testimony Related Activities**

### **1 Purpose**

These practices establish requirements related to testimony. These practices describe the steps required prior to testimony (e.g., requesting documents for discovery, updating Curriculum Vitae (CV) to be submitted for court purposes), information related to providing testimony, the information that must be entered into the Testimony Tracker, and steps for monitoring testimony that will aid in identifying opportunities for improving an expert witness' testimony. These practices also satisfy the requirements of the FBI Laboratory Quality Assurance Manual, the applicable accrediting body(ies), and the Department of Justice (DOJ) Testimony Monitoring requirements.

### **2 Scope**

These practices apply to FBI Laboratory personnel who provide expert testimony as part of their current and past FBI job duties (i.e., testifying personnel) and their managers. Additionally, these practices apply to personnel who conduct testimony evaluations and personnel who support testimony related activities.

### **3 Pre-Testimony Activities**

#### **3.1 Curriculum Vitae**

**3.1.1** Testifying personnel will maintain a CV electronically and keep it up to date. Testifying personnel should review their CV quarterly. Testifying personnel will review their CV for accuracy prior to providing it to agents, the Office of General Counsel (OGC), and/or court officials, upon discovery request, and/or upon receipt of a subpoena. The CV will not contain any official seal. See Appendix A for an example template for use in creating a CV.

**3.1.2** The previous four years of testimonies, to include depositions and grand jury testimonies (unless prohibited), will be listed on the CV. No testimonies older than four years will be listed on the CV. The minimum information will include the case name (e.g., United States vs. John Doe), the year of the testimony, the jurisdiction (e.g., Eastern District of New York) or location (i.e., City, State), and the discipline.

#### **3.2 Testimony Requests**

**3.2.1** Testifying personnel will notify their management of any request for their testimony. A manager will notify in writing an individual who is no longer working in the same position/discipline/category of testing in which the testimony will occur of the requirements in

this document to include Section 6 which must be met prior to the testimony.

**3.2.2** Upon receipt of a subpoena request to testify, personnel will notify OGC. Testifying personnel will ensure the subpoena is attached to the associated entry in the Testimony Tracker.

**3.2.3** If the request for testimony is received in a manner other than a subpoena (e.g., verbal request, email request), testifying personnel will request a subpoena and notify OGC.

### **3.3 Discovery Requests**

**3.3.1** Discovery requests will be coordinated through OGC.

**3.3.2** Testifying personnel will ensure that all reports, 1A files, updated CV, and applicable level 2 documents in use at the time of their examinations are provided in Discovery. The applicable level 2 documents will be added to the appropriate folder on the Discovery Request SharePoint site. For discovery requests that include a request for prior transcripts for testifying personnel, the request for the testimony information will be included as part of the same request.

**3.3.3** Upon receipt of all material associated with the discovery request (e.g., level 2 documents, transcripts request, CV, 1A), the Discovery and Testimony Monitoring Program Manager (DTMPM) will ensure that the Laboratory Quality System documents (applicable levels 1 and 2 documents) and any supporting records submitted are provided in accordance with the request along with any available requested transcripts for the testifying personnel.

## **4 Providing Testimony**

**4.1** All expert testifying personnel must provide testimony such that:

- Testimony is consistent with FBI Laboratory practices and procedures regarding testimony about the forensic analysis and interpretation of evidence;
- Testimonial opinions, conclusions, and statements regarding case-specific facts or data are properly qualified and do not exceed the limitations of any relevant method or discipline/category of testing; and
- Conclusions are in conformity with the applicable Approved Standards for Scientific Testimony and Reports (ASSTR) document(s), which are in accordance with the applicable DOJ approved Uniform Language for Testimony and Report document(s).

**4.2** All testifying personnel will enter their testimony into the Testimony Tracker and complete all fields with appropriate information, when practicable.

## **5 Post-Testimony Activities**

The expert testimony of FBI Laboratory personnel will be monitored. A transcript will be requested for every expert testimony provided and evaluated when received.

### **5.1 Transcript Requests**

**5.1.1** After testimony, the Unit Chief of the person who provided expert testimony will ensure all post-testimony related information is properly recorded in the Testimony Tracker to best facilitate the requesting of transcripts.

**5.1.2** The DTMPM will ensure a transcript is requested for each expert testimony logged in the Testimony Tracker. The date of a transcript request will be recorded in the Testimony Tracker.

**5.1.3** The DTMPM will ensure that at least two additional attempts are made within one year to obtain a transcript. The interval between the attempts will be at least three months. Follow-up attempts to obtain a transcript will be recorded in the Testimony Tracker. Once a transcript is received, follow-up attempts are no longer required. When a transcript is received, the date of receipt will be recorded in the Testimony Tracker.

**5.1.4** When a transcript will not be made available (e.g., sealed testimony, court official responds that a transcript will not be created, grand jury), the person who received the notification that the transcript will not be created will ensure a comment is added to the Testimony Tracker noting that the transcript will not be created. Follow-up attempts are no longer required.

**5.1.5** If the DTMPM is unable to obtain a transcript(s) or confirm that a transcript(s) will not be created after attempting to obtain the transcript as described in Sections 5.1.2 through 5.1.4, the DTMPM will notify OGC to allow OGC the opportunity to obtain the transcript(s). The date of the contact and name of the OGC personnel contacted will be recorded in the Testimony Tracker.

**5.1.6** If a transcript is received by personnel outside of the Forensic Analysis Support Unit (FASU), the personnel will notify the DTMPM of the date of the receipt of the transcript, and the transcript will be forwarded to the DTMPM for retention after reviews are complete.

### **5.2 Transcript Retention**

**5.2.1** Transcripts will be retained electronically by the DTMPM for at least four years from the date the testimony was provided.

**5.2.2** Before deleting a transcript, the DTMPM will contact the appropriate Unit Chief to determine if a redacted copy will be retained for training purposes. The DTMPM will redact all identifying information prior to providing the transcript.

**5.2.3** Transcripts that are found to have substantive violations, material inaccuracies, or for which disclosure was made by OGC as described in Section 5.3.2.5.1, will be retained permanently by the DTMPM and provided upon discovery request when prior transcripts are requested.

**5.2.4** Transcripts will not be retained by the FBI Laboratory in any manner other than those described above.

## **5.3 Testimony Monitoring**

### **5.3.1 Testimony Evaluators**

Personnel will not conduct a testimony evaluation of their own testimony. Technical Leaders are authorized to conduct testimony evaluations in their discipline/category of testing. Additionally, a Technical Leader and the appropriate Unit Chief may authorize additional personnel to conduct testimony evaluations. Authorized personnel must have been previously competency tested in the discipline/category of testing they are evaluating. This authorization will be recorded in Sentinel.

### **5.3.2 Transcript Review and Evaluation**

**5.3.2.1** All transcripts received will be reviewed and evaluated using the *Evaluation of Testimony* (7-256) (Appendix B). Video and audio recordings, if the voices are readily distinguishable, will be treated as transcripts.

**5.3.2.2** All testimony reviews, evaluations and the related meetings must be completed within 30 calendar days of the receipt of the transcript in the FBI Laboratory or the direct observation of the testimony.

**5.3.2.3** The expert witness will review the transcript of their testimony prior to evaluation by an authorized testimony evaluator. The review provides an opportunity for witness input prior to the evaluation. After reviewing the transcript, the witness will complete Section A of the *Evaluation of Testimony*. The witness will also ensure the date their review is completed is entered into the Testimony Tracker.

**5.3.2.3.1** If a transcription error is detected that impacts the substance of the examiner's testimony, the witness will notify their manager and OGC and ensure that any written communication regarding such transcription errors will be entered into the associated case file(s) in Sentinel and provide a copy to the DTMPM.

**5.3.2.3.2** This written communication will also be added as an addendum to the transcript retained by the DTMPM.

**5.3.2.4** The authorized testimony evaluator will review the transcript after the expert witness has completed their review. The testimony evaluator may review a copy of the *Laboratory*

*Report* (7-1, 7-1 LIMS), the FBI Laboratory file, and/or any other material supporting the testimony to assist in their evaluation.

**5.3.2.5** The evaluation will determine if the testimony is compliant with the requirements listed in Section 4.1.

**5.3.2.5.1** An evaluator shall find testimony non-compliant if a substantive violation of any of the requirements listed in Section 4.1 has occurred. The term substantive violation shall be interpreted as a meaningful or significant violation of any requirement listed in Section 4.1, within the context of the entirety of the examiner's testimony. A substantive violation is not a trivial misstatement or the in-artful phrasing of a testimonial statement. In addition, a misstatement that is later corrected during a testimonial presentation or that constitutes an isolated reference clarified by the balance of an examiner's testimony would not generally be considered a substantive violation of the listed criteria. A final determination that the testimony was either compliant or non-compliant must be based on the testimony as a whole. A statement made by counsel or the judge at a time when an examiner is not afforded an opportunity to intercede, such as during opening or closing remarks, would not constitute a substantive violation of the listed criteria.

**5.3.2.5.2** If the evaluator identifies testimony that is potentially noncompliant with the criteria listed in Section 4.1, the evaluator shall consult with OGC and the sponsoring attorney to determine if a substantive violation has occurred. However, the decision whether a testimonial presentation was compliant or non-compliant shall be made by the evaluating laboratory official. After obtaining input from OGC and the sponsoring attorney, the evaluator shall form a conclusion as to whether the testimony at issue was compliant or non-compliant.

**5.3.2.5.3** Testimony may be compliant with the requirements of Section 4.1 (i.e., does not constitute a substantive violation), but still contain one or more materially inaccurate statements. A materially inaccurate statement is one which tends to make any fact *at issue* before the court more or less likely. A "materially inaccurate" statement may include, one which impacts the strength of an examiner's conclusion. For example, a "materially inaccurate" statement may be found where an examiner provides different answers during direct and/or cross examination, if such differing answers bear on the same fact, which is at issue before the Court. If an evaluator identifies a potential materially inaccurate statement, the evaluator shall consult with OGC.

**5.3.2.6** After evaluating the transcript, the authorized testimony evaluator will complete Section B of the *Evaluation of Testimony*. The testimony evaluator will ensure the date their evaluation is completed is entered into the Testimony Tracker.

### **5.3.3 Direct Observation, Review and Evaluation**

**5.3.3.1** An authorized testimony evaluator may directly observe a witness testify as an option for testimony monitoring.

**5.3.3.2** After testifying, the expert witness will complete Section A of the *Evaluation of Testimony* prior to evaluation by an authorized testimony evaluator. The review provides an opportunity for witness input prior to the evaluation. The witness will ensure the date their review is completed is entered into the Testimony Tracker.

**5.3.3.3** The testimony evaluator will then complete Section B of the *Evaluation of Testimony*. The testimony evaluator will ensure the date their evaluation is completed is entered into the Testimony Tracker.

**5.3.3.4** A transcript of the testimony will still be requested and retained as described in sections 5.1 and 5.2. Subsequent review and evaluation of the transcript upon receipt is not required.

#### **5.3.4 Overall Evaluations**

**5.3.4.1** Completion of the *Evaluation of Testimony* (7-256) form

**5.3.4.1.1** If a “Y” response is marked for any of the questions in Section B of the *Evaluation of Testimony*, the testimony is deemed to have a substantive violation and will be considered unsatisfactory. If “N” responses are marked for all of the questions in Section B of the *Evaluation of Testimony*, the testimony is considered satisfactory. A testimony can be deemed satisfactory (i.e., “N” responses for all questions in Section B) and still have recommendations for improvement.

**5.3.4.2** If the evaluator concludes the testimony was unsatisfactory (i.e., any “Y” responses in Section B of the *Evaluation of Testimony*), the testimony evaluator will notify the witness’ manager in writing at the time this is determined.

**5.3.4.3** The testimony evaluator will prepare a detailed explanation of the reason(s) for determining the testimony was unsatisfactory and recommendations for improvement. This will be attached to the *Evaluation of Testimony* and signed and dated by the witness, the testimony evaluator, and the witness’ manager.

**5.3.4.4** The witness’ manager will notify OGC of any testimony deemed unsatisfactory and the sponsoring attorney shall be notified. This notification will be recorded in Section C of the *Evaluation of Testimony*.

**5.3.4.5** The witness’ manager will notify the DTMPM of any testimony deemed unsatisfactory. The DTMPM will track all testimonies deemed unsatisfactory and retain a copy of the completed form and written notification to the sponsoring attorney.

**5.3.4.6** When practicable, the witness’ next testimony will be directly observed.

**5.3.4.7** Additionally, for substantive violations, a *Corrective Action Request* (7-254) will be initiated, and the appropriate personnel notified, to include the Quality Manager, according to the Laboratory Operations Manual (LOM) - Practices for Addressing a Nonconformity. For any nonconforming testimony that is not determined to be a substantive violation, the manager will ensure the Practices for Addressing a Nonconformity are followed.

### **5.3.5 Evaluation of Testimony Meeting**

The testimony evaluator will meet with the witness to discuss the completed *Evaluation of Testimony*. This meeting will be recorded by each party in Section C of the *Evaluation of Testimony*. The witness' manager must also attend this meeting if a testimony is deemed unsatisfactory or at the testimony evaluator's request. The manager will mark the box on the *Evaluation of Testimony* indicating attendance, if they attended the meeting. If the witness' manager does not attend the meeting with the witness, the manager will sign the *Evaluation of Testimony* acknowledging the content of the evaluation.

### **5.3.6 Testimony Found to Contain a Materially Inaccurate Statement**

**5.3.6.1** If the evaluator identifies one or more *potentially* material inaccurate statements, the testimony evaluator will notify OGC to evaluate the materiality of the inaccurate statement(s) within the context of the court proceeding as a whole, and to determine if formal disclosure of the statement to the sponsoring prosecutor is necessary.

**5.3.6.2** Regardless of whether the testimony is determined to be materially inaccurate, for any nonconforming testimony that is not determined to be a substantive violation, the manager will ensure the Practices for Addressing a Nonconformity are followed.

**5.3.6.3** The witness' manager will notify the DTMPM of any testimony that is found (by concession of OGC or the sponsoring prosecutor, or by a court ruling) to contain a material inaccuracy, or that has been deemed by OGC to merit a formal disclosure due to the potential for it to be considered materially inaccurate. The DTMPM will track all such testimonies and retain a copy of the completed *Evaluation of Testimony* and written notification to the sponsoring attorney.

### **5.3.7 Giglio Requirements**

**5.3.7.1** The FBI Laboratory and its employees must disclose to a prosecutor all potential *Giglio* information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case.

**5.3.7.2** *Giglio* information includes all information that could potentially be used by the defense to impeach a witness. This includes information that could be used by the defense to call into question the accuracy and/or strength of an examiner's professional conclusion. This also

encompasses personal choices and circumstances which occur outside the context of a criminal investigation and could potentially be used by the defense to attack a witness' credibility or character for truthfulness, or information that could potentially be used to suggest a witness is biased in favor of the prosecution or against a defendant. However, potential impeachment material may be found in a myriad of forms and is not limited to these.

**5.3.7.3** Upon receipt of a *Giglio* request, the FBI Laboratory shall disclose all agency-held information that could potentially be used for impeachment purposes. At a minimum this includes, but is not limited to:

- Errors made during proficiency tests
- Allegations or findings of unsatisfactory and/or inaccurate casework performance
- Testimony in violation of the ULTRs or ASSTRs
- Testimony that does not violate the ULTRs or ASSTRs, but contains a material inaccuracy
- Information required to be disclosed as a result of the 1997 OIG Report or Microscopic Hair Comparison Review
- Personnel records reflecting allegations of or findings of misconduct that reflect on the candor or possible bias of an employee

**5.3.7.4** A testimonial presentation that has been found to contain a substantive violation, or that is found (by concession of OGC or the sponsoring prosecutor, or by a court ruling) to contain a material inaccuracy, or that has been deemed by OGC to merit a formal disclosure due to the potential for it to be considered materially inaccurate is considered potential *Giglio* material and will be disclosed during the established discovery process.

**5.3.7.5** Disclosures of potential *Giglio* information held by the agency will be coordinated through OGC.

**5.3.7.6** Upon notification that a *Giglio* request has been received, the notified employee must also contact the prosecutor to schedule a candid conversation with the prosecutor to disclose any information he or she believes could potentially constitute *Giglio* (impeachment) information.

## **6 Testimony Related Activities by Personnel No Longer in Position/Discipline/Category of Testing**

FBI Laboratory personnel, who are no longer working in the same position/discipline/category of testing in which the testimony will occur, will discuss their anticipated testimony with the appropriate Technical Leader and notify OGC. The witness will review the relevant ASSTR(s) and ULTR(s) prior to their testimony, when applicable. All associated meetings and reviews will be recorded as a comment on the appropriate entry in the Testimony Tracker.



## 7 Testimony Related Activities when Examiner Has Not Testified

Examiners that are expected to testify as part of their current FBI job duties may not have the opportunity to do so every calendar year. Each Unit Chief who manages examiners whose current duties include providing testimony will ensure that the potential need for refresher testimony exercises (i.e., not testify at least once in a five-year time period) is monitored in their unit.

### 7.1 Refresher Testimony Exercises for Examiners

**7.1.1** An examiner, who is expected to testify as part of their current FBI job duties and does not provide expert testimony at least once in a five-year time period, will participate in a refresher testimony exercise. The refresher testimony exercise will occur no more than 60 calendar days after the end of the five-year time period (i.e., date of last moot court exercise, date of last refresher testimony exercise, date of last testimony). The examiner's Unit Chief and applicable Technical Leader will define the requirements of the refresher testimony exercise and provide them to the examiner in writing 30 days prior to the exercise.

**7.1.2** The refresher testimony exercise will be viewed by the examiner's Unit Chief and the applicable Technical Leader. Additional personnel may attend.

**7.1.3** The examiner's Unit Chief and applicable Technical Leader will provide feedback to the examiner at the conclusion of the refresher testimony exercise. Feedback may be provided verbally. If the exercise is successfully completed, no further records are required, except as provided in section 7.1.4 below.

**7.1.4** The Unit Chief will ensure the refresher testimony exercise is entered into the Testimony Tracker. A comment will be added to the corresponding Testimony Tracker record indicating who was present at the exercise. Any fields not applicable to the refresher testimony exercise will be marked as such in the Testimony Tracker. Results and other written records created during the exercise will be retained in the examiner's unit.

**7.1.5** If the examiner's Unit Chief and/or applicable Technical Leader determine that the exercise was not successfully completed, the Unit Chief will ensure a *Corrective Action Request* is initiated. The *Corrective Action Request* will include an appropriate remediation plan.

## 8 Records

The following records will be generated and/or retained through one accreditation cycle, unless otherwise noted:

- Notification of manager to individuals who are no longer working in the same position/discipline/category of testing in which the testimony will occur.
- Records associated with the authorization of individuals to conduct testimony evaluation will be retained permanently in Sentinel.

- Discovery request entries will be retained permanently in the Discovery Request site.
- Testimony Tracker entries will be retained permanently in Testimony Tracker.
- *Evaluation of Testimony* forms and any supplemental records, if applicable, will be retained in the unit.
- *Evaluation of Testimony* forms and written communication to the sponsoring attorney for testimony deemed to include substantive violations, material inaccuracies, or for which disclosure was made by OGC will be retained permanently by the DTMPM.
- Transcripts will be retained by the DTMPM for 4 years from the date each testimony occurred.
- Transcripts that include substantive violations, material inaccuracies, or for which disclosure was made by OGC will be retained permanently by the DTMPM.
- Written communications regarding transcription errors will be retained in the case file in Sentinel.
- Record of transcription errors identified by the testifying individual will be retained in Sentinel and by the DTMPM as an addendum to the associated transcript.
- Records associated with refresher moot court exercises will be retained in Testimony Tracker, and in the examiner's unit.

## 9 References

FBI Laboratory Quality Assurance Manual, Federal Bureau of Investigation, Laboratory Division, latest revision.

ISO/IEC 17025 - General Requirements for the Competence of Testing and Calibration Laboratories, International Organization for Standardization, Geneva, Switzerland, 2017.

ISO/IEC 17025:2017 - Forensic Science Testing and Calibration Laboratories Accreditation Requirements (AR 3125), ANAB, Milwaukee, WI, April 29, 2019.

Department of Justice Testimony Monitoring Framework, <https://www.justice.gov/olp/forensic-science#testimony>

Rev. #	Issue Date	History
12	06/03/19	In section 2, added that these practices apply only to expert witness testimony. Added section 3.1.3.1 to require removal of a CV for personnel no longer with the FBI Laboratory. In section 3.2.2, changed requirement so that subpoenas are attached to Testimony Tracker entries, rather than Discovery Request entries. In section 5.3.1, added that personnel will not evaluate their own testimony and that authorized personnel must have been competency tested. In section 7.2.1, clarified that personnel who provide expert testimony are subject to refresher testimony exercise requirements. Ensured the term "testimony evaluator" used throughout. Updated list of references in section 9.
13	12/21/20	Grammatical and editing changes made throughout for clarity. Revised entire document based on revised DOJ Testimony Monitoring Framework and OGC guidance 5 – Added: DOJ Testimony Monitoring Framework Updated Appendix B <i>FBI Laboratory Evaluation of Testimony</i> (7-256)

Redacted - Signatures on File

**Approval**

Laboratory Director

Date: 12/18/2020

Quality Manager

Date: 12/18/2020

**Appendix A: *Example CV Template***

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**Appendix B: *FBI Laboratory Evaluation of Testimony (7-256)***

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**Appendix B: *FBI Laboratory Evaluation of Testimony* (7-256) continued**

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